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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1045

WILLIAM LEIGHTON, a stockholder of Paramount Pictures Corporation, on behalf of himself and all others similarly situated and for and on behalf of Paramount Pictures Corporation,

Petitioner-Plaintiff,

—v.—

PARAMOUNT PICTURES CORPORATION, BARNEY BALABAN, EDWIN L. WEISL and PAUL E. MANHEIM,

Respondents-Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in this case on January 12, 1965. Such judgment affirmed orders of the District Court for the Southern District of New York entered in this case on December 23, 1963, March 11, 1964, and, assertedly on February 4, 1964. However, the record shows that no orders were entered by the District Court on February 4, 1964.

Opinions Below

Two opinions were handed down by the District Court on November 18, 1963 and March 2, 1964, and are unreported. These opinions are appended hereto, as are the other memorandum orders entered by the District Court in this action.

The opinion of the Court of Appeals was handed down on January 12, 1965 and is also appended hereto.

Jurisdiction

The jurisdiction of this Court to review the judgments below is invoked on the basis of 28 U. S. C. 1254(1).

Questions Presented

1. Whether the proceedings in the District Court are not vitiated and infected through the participation as counsel for the defendants of one Mark D. Geraghty who, at all times prior to January 7, 1964, was not a member of the Bar of the District Court.

2. Whether the proceedings in the District Court did not violate F. R. Civ. P. 6(b), 11, 12, 23(b) and (c), 55, 65(b), (c) and (d), such Rules having been disregarded, at the instance of the defendants, at each and every step during the course of such proceedings.

3. Whether the denial of petitioner's motion for the entry of default judgments against the individual defendants does not unconstitutionally and unlawfully deprive the nominal respondent Paramount Pictures Corporation

and petitioner of their property consisting of their right to such judgments, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

4. Whether, as applied in this case, Civil Rule 2 of the United States District Court for the Southern District of New York is not null and void for inconsistency with F. R. Civ. P. 6(b), 11, 12, 23(b) and (c), 41(b), 55 and 65(b), (c) and (d), contrary to F. R. Civ. P. 83.

5. Whether in the absence of any injunction running as to petitioner, the filing by petitioner of a motion under F. R. Civ. P. 11 and General Rule 5(b)(4) of the District Court, subsidiary to a motion under F. R. Civ. P. 60(b)(3) can constitute a "contempt" of the District Court, for which petitioner was fined $800, with the alternative of imprisonment.

6. Whether, in the absence of any statute of the United States enabling it to do so, the District Court may adjudge petitioner to be guilty of civil contempt without a trial, without a hearing and at the instance of attorneys whom petitioner had timely challenged as being disqualified from representing the individual respondents and the nominal defendant corporation, where the District Court has twice refused to hear and determine such challenge.

7. Whether the judgment of the Court of Appeals, which affirmed judgments of the District Court, should not be vacated for inconsistency with the record and because it rests on an ambiguous jurisdictional basis.

Constitutional Provision, Statutes and Rules

The case involves the Court of Appeals' construction of F. R. Civ. P. 83 and of the several Federal Rules of Civil Procedure referred to in Questions Presented (2), (3), (4) and (5). These are included in the appendix hereto, as are the local Civil and General Rules of the District Court, promulgated under the asserted authority of F. R. Civ. P. 83.

Statement of the Case

This is a stockholder's derivative action commenced by petitioner (plaintiff below) on October 8, 1963, as a stockholder of record of Paramount Pictures Corporation. The action was filed after the respondents (defendants below) refused to include in the corporation's proxy statement for 1963 petitioner's demand that action be taken by the shareholders as provided by F. R. C. P. 23(b).

In the words of the Court of Appeals, petitioner's complaint

> "appeared to charge that the individual defendants, directors of Paramount Pictures Corporation, wasted corporate assets and plundered the corporate treasury. (Petitioner) requested that various sums paid by Paramount be recovered from the individual defendants, that a receiver be appointed for Paramount, that various contracts to which Paramount was a party be cancelled, and that an injunction be issued against further payments by it without the permission of the stockholders. Jurisdiction was based on the Securities Exchange Act of 1934, 15 U. S. C. Section 78aa, and 'the postal statutes', 28 U. S. C. Section 1339."

The respondents have not joined issue whether by answering or by moving against the complaint within the time prescribed by the summons and F. R. Civ. P. 12. Instead the respondents suggested, and the District Court acceded, to a unique procedure that ignores F. R. Civ. P. 12 and that is said to be based on the District Court's local Civil Rule 2.

Thus, on October 29, 1963, the respondents obtained from the District Court an *ex parte* "stay of proceedings" and an indefinite extension of time within which to move or answer the complaint (App. 6a). The "stay" was in the nature of a temporary restraining order but was issued without security and without the observance of the procedural safeguards of F. R. Civ. P. 65(b). The respondents promptly removed the stay order from the Federal courthouse in Foley Square and kept it in their possession for two days. They made no attempt to serve petitioner whether on October 29, or on October 30, 1963. No affidavits of attempted but unsuccessful service were filed by the respondents.

On October 31, 1963, the respondents served the stay order upon petitioner and also filed that order with the Clerk of the District Court. The stay order was subsequently ruled by the District Court to have been effective between October 29 and November 18, 1963, i.e. for a period of 21 days (App. 23a).

Coupled with the stay order, the District Court also ordered petitioner to show cause, on three days' notice including Saturday and Sunday, why petitioner should not be required to post security of $100,000 under its local Civil Rule 2 in favor of the defendants. While procedure by Order to Show Cause is described by the District Court's General Rule 9(c)(4) to require "a clear and specific show-

ing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary", in practice and in this case, the show cause procedure was twice used by the respondents in order to surprise and oppress petitioner.

On October 31, 1963, the respondents also entered their appearance below by filing a "Memorandum in support of motion to require plaintiff to post security". No formal notice of appearance was otherwise filed by the respondents. Contrary to F. R. C. P. 11 and 7(b)(2), the memorandum bore no manuscript signature of any attorney. It bore the typewritten names of Leonard Kaufman, as attorney for respondent Paramount, and of Whitney North Seymour, Jr., Mark D. Geraghty and James J. Hagen as being "of counsel" to the individual defendants. Of these persons, Mark D. Geraghty was not then a member of the Bar of the District Court.

On November 4, 1963, the District Court heard oral argument on respondents' "motion to require plaintiff (petitioner) to post security" and decision was reserved until November 18, 1963, when $2,000 security was imposed upon petitioner, in the nature of a penalty (App. 7a). An Order upon this decision was entered on December 23, 1963 (App. 8a), and it included a "stay" rather than an "injunction". No security was required of the respondents as a condition for the issuance of this "stay". By further order filed January 8, 1964 (App. 10a), the District Court denied petitioner's application for a certificate under the Interlocutory Appeals Act, 28 U. S. C. Sec. 1292(b), and, on January 9, 1964, the Court of Appeals also denied petitioner's application for leave to appeal, R. 72a. Nevertheless, petitioner filed a timely notice of appeal from the District Court's order of December 23, 1963 (App. 10a).

On November 13, 1963, the District Court entered an Order (App. 6a), striking from its motion calendar petitioner's motion for the disqualification of counsel for the individual respondents, for a preliminary injunction and for the appointment of a receiver. This matter was never restored to the motion calendar of the District Court because of the intervening "stay of proceedings" obtained by the respondents. Thereafter, the challenged counsel, Whitney North Seymour, Jr., Esq. continued to represent the individual defendants in the District Court and in the Court of Appeals and also assumed control of the nominal respondent corporation's defense of the action.

On January 22, 1964, the District Court entered orders (App. 11a), denying petitioner's motions to vacate the "stay", for the entry of default judgments against the respondents and for the reinstatement on its motion calendar of the motions which had been struck off by its order of November 13, 1963. The basis of petitioner's motion for the entry of default judgments against the respondents was the nullity of the District Court's order extending respondents' time to move or answer the complaint. Notice of appeal from these orders was filed on February 20, 1964 (App. 14a). These are the orders to which the Court of Appeals erroneously referred in the syllabus of its opinion as having been entered on "February 4, 1964".

On January 23, 1964, the District Court entered an Order, Judgment and Decree, dismissing the action as to petitioner only, and with prejudice (App. 13a). A notice of appeal from this order was filed on February 20, 1964 (App. 14a). However, the Court of Appeals failed to consider this final decision in its opinion.

On March 2, 1964, the District Court filed an opinion denying petitioner's motion to vacate the dismissal of the

complaint and, on the basis of an Order to Show Cause obtained by respondents on three days' notice, held petitioner in civil contempt for having concurrently sought the striking of "all pleadings, memoranda of law, affidavits, motions and other papers filed in this action by the defendants up to and including January 7, 1964; a reference to the Chief Judge of plaintiff's charges allegedly warranting disciplinary proceedings against a member of the bar of this court; and an order protecting him from 'further abuse of process by the defendants'." The basis of petitioner's motion was Mark D. Geraghty's practice of law in the District Court, in this case, without being a member of the Bar of the District Court. Orders were thereafter entered upon this opinion (App. 28a, 29a), and from these orders, a further notice of appeal was filed (App. 31a).

The record shows that Mark D. Geraghty was admitted to the Bar of the District Court on January 7, 1964, on motion of Whitney North Seymour, Jr. who is counsel of record for the individual respondents in the District Court and in the Court of Appeals.

Reasons Relied Upon for Granting the Writ

1. The Court of Appeals has sanctioned the District Court's enforcement of local Civil Rule 2 that is disruptive of the pattern of the Federal Rules of Civil Procedure and has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. *Schlagenhauf* v. *Holder,* 379 U. S. 104, Supreme Court Rule 19(1)(b), last sentence. Under the purported authority of its Rule, the District Court dismissed the complaint upon the merits without the defendants' having joined issue.

2. The Court of Appeals has sanctioned the District Court's issuance of a "stay" based on the District Court's local Civil Rule 2, which stay is equivalent to an injunction but which was issued without observing the procedural safeguards of F. R. Civ. P. 65. Since the District Court's power to issue such a "stay" is said to rest on F. R. C. P. 83, certiorari should be granted to review this practice which has never received the approval of this Court, *Schlagenhauf* v. *Holder, supra.*

The Court of Appeals had previously refused to review by way of mandamus the practice complained of by petitioner, and this Court had denied certiorari to review such refusal, *Leighton* v. *Paramount Pictures Corp.*, 377 U. S. 919 (1963).

3. Disregarding the holdings of *J. I. Case* v. *Borak*, 377 U. S. 426, the Court of Appeals has sanctioned the arbitrary, capricious and discriminatory imposition upon petitioner of "security for costs" prior to joinder of issue by the defendants.

This imposition, said to be based on the District Court's local Civil Rule 2, was in an excessive and unjustified amount, twice the taxable costs allowed by this Court in *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227 (1964).

The District Court's arbitrary and capricious rulings in this case are in sharp contrast with its disposition of a similar case, *Kane* v. *Central American Mining & Oil Co.*, 235 F. Supp. 559 (1965), where security for costs in the amount of $250 under local Civil Rule 2 was imposed because of the plaintiff's non-residence of the District and only after joinder of issue by the defendants.

4. The Court of Appeals has misconceived the decision of this Court in *United States* v. *United Mine Workers*, 330

U. S. 258, 289-295 (1947) by failing to differentiate between civil and criminal contempt and has sustained, on the basis of its misconception, the District Court's order holding petitioner in civil contempt for the asserted violation of a "stay" issued by the District Court contrary to the procedural requirements of F. R. Civ. P. 65 and in excess of the District Court's powers under F. R. Civ. P. 83.

The judgment of the Court of Appeals ignores the decisions of this Court in *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (1957) and *Donovan* v. *City of Dallas,* 377 U. S. 408 (1963), both of which held that a finding of civil contempt must rest on a determination of the validity of the order said to have been violated.

5. The judgment of the Court of Appeals lacks a definite jurisdictional basis, appellate jurisdiction having been assumed *arguendo* by the Court of Appeals. This is contrary to *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 307 (1961) and cases therein cited.

The Court of Appeals' denial of petitioner's application for leave to appeal, pursuant to the Interlocutory Appeals Act, 28 U. S. C. 1292(b), the stay and security-for-costs order issued by the District Court under the asserted authority of F. R. Civ. P. 83, is based on the erroneous theory that such an order is not so appealable whereas an injunction issued by the District Court under the authority of F. R. Civ. P. 65 is appealable pursuant to that Act, 28 U. S. C. 1292(a).

Because of this error, the Court of Appeals failed to determine the basis of appellate jurisdiction. Previously, in *Phelps* v. *Burnham,* 327 F. 2d 812 (1964), the Court of Appeals erroneously assumed jurisdiction under the final decision statute, 28 U. S. C. 1291, to review a stay and security-for-costs order.

6. The judgment of the Court of Appeals is inconsistent with the record, since it fails to dispose of petitioner's appeal from the final decision of the District Court, entered in this case on January 23, 1964 (App. 13a), which dismissed petitioner's complaint before the respondents had joined issue. Under F. R. Civ. P. 41(b), this dismissal operates as an adjudication upon the merits. Thus, petitioner has been denied his right to appellate review of the District Court's final decision.

7. Contrary to the principles of 7 C. J. S. Section 16, the Court of Appeals has sanctioned the unauthorized practice of law of Mark Daly Geraghty in this case and has refused to require the District Court to make specific findings with respect thereto.

Prior to taking the appeal, petitioner did request the District Court to make such findings, in accordance with its Rules, and for making such request, petitioner was held in contempt by the District Court.

Petitioner invokes this Court's power of supervision over the lower courts because of the arbitrary, capricious and discriminatory manner of the contempt proceeding and the appellate review thereof.

8. The District Court had no power, under F. R. Civ. P. 83, to impose security for costs upon petitioner and stay all proceedings on his part because the respondents' willful default in failing to move against or answer the complaint entitled petitioner to the entry of default judgments against the respondents pursuant to F. R. Civ. P. 55 and 12.

The District Court's *ex parte* order extending respondents' time to so move or answer was null and void under the rationale of *United States* v. *F. M. Schaefer Brewing*

Co., 356 U. S. 227, the order having been procured by the respondents on October 29, 1963 under the "within time" provision of F. R. C. P. 6(b)(1) but filed by them with the Clerk of the District Court "out of time", on October 31, 1963.

The District Court ignored the *F. M. Schaefer* decision in denying petitioner's motion for the entry of default judgments against the respondents and the Court of Appeals, in its opinion, omitted a discussion of this point.

The District Court failed to take disciplinary action against the respondents for removing the *ex parte* order from the Federal Courthouse in Foley Square and for keeping said order in their possession for two days.

CONCLUSION

For the reasons above stated, the petition for certiorari should be granted. Petitioner prays that, if the writ is granted, the case be heard on the appendix to this petition which contains the entire record upon which petitioner relies in seeking the writ, with the exception of the complaint which the respondents neither answered nor moved against. Accordingly petitioner prays that the printing of the record under Rule 36 be dispensed with.

Respectfully submitted,

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April, 1965